Supreme Court, U. S.
FILED
MAY 23 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1979

No. 79-1568

DISTRICT OF COLUMBIA,
Petitioner,

v.

RICHARD A. BISHOP, et al.,
Respondents.

On Petition For A Writ Of Certiorari To The District Of Columbia Court Of Appeals

REPLY

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Petitioners seek this Court's review of the decision of the Court of Appeals because of the importance of the questions it raises with regard to the nature and extent of Congress's delegation to the people of the District of Columbia of its power to legislate for the District granted by article I, section 8, clause 17 of the United States Constitution and because of the severe impact of the deci-

sion on the fiscal stability of the District. Respondents do not dispute the grave fiscal consequences ensuing from the decision of the Court of Appeals to invalidate the District's franchise tax on unincorporated professional and personal services businesses operating in the District. However, they deny that the decision severely restricts the congressional grant of self-government to the people of the District under the District of Columbia Self-Government and Governmental Reorganization Act (the "Self-Government Act") by arguing that Congress "expressly and deliberately" withheld from the District the power to impose such a tax. (See Bishop Br. 7; Kleiboemer Br. 9). Ignoring the stated intent of Congress in that Act to grant the District as broad legislative authority as constitutionally permissible, *id.* §§ 102(a), 302, D.C. Code §§1-121(a), 1-124 (Supp. V, 1978), and established rules of statutory construction, respondents, like the Court of Appeals, rely exclusively upon a narrow restriction on the District's legislative power, contained in § 602(a)(5) of the Act, D.C. Code, § 1-147(a)(5) (Supp. V, 1978). This provision, however, by its plain terms simply precludes the District from imposing a tax on the *personal* income of nonresident *individuals,* but not from imposing a *franchise* tax on unincorporated *business entities* the owners of which reside outside the District. The only support that respondents or the Court of Appeals offer for their conclusion that Congress intended to deny the citizens of the District this basic taxing authority consists of a few isolated statements by members of Congress. A brief examination of these statements, however, reveals that respondents and the Court of Appeals have distorted their significance and that they cannot overcome the plain meaning of the Self-Government Act. Cf. *Gemsco, Inc.* v. *Walling,* 324 U.S. 244, 260 (1945). Accordingly, this Court should not permit these misleading statements to obscure the gravity of the deprivation of self-government that the

decision of the Court of Appeals entails or to minimize the significance of the questions presented by this petition.

The legislative history upon which respondent Kleiboemer relies is not that of the Self-Government Act or any home rule bill, but rather of the District of Columbia Professional Corporation Act, Pub. L. 92-180, 85 Stat. 576 (1971). He cites a committee report pertaining to that Act for the proposition that Congress refused to extend the franchise tax in its District of Columbia Income and Franchise Tax of 1947 to professionals "because such removal would impose a 'commuter' tax on 'one group of taxpayers.'" (Kleiboemer Br. 9). However, the quoted language was not, as respondents would have this Court believe, a statement by the committee, but was offered merely as a summary of the second of two arguments advanced by "[r]epresentatives of the Bar Association." See H.R. Rep. No. 92-508, 92d Cong., 1st Sess. 4 (1971). The committee itself did not characterize the franchise tax as a "commuter tax." This statement is not in the slightest manner indicative of the intent of the 93d Congress in enacting the Self-Government Act.

Respondent Bishop, likewise, relies on statements taken out of context as indicative of Congress's intent in enacting § 602(a)(5). He asserts that "Senator Eagleton himself described this provision as a 'specific prohibition as to the imposition of a commuter tax, a reciprocal income tax, *or any other tax* on nonresidents of the District of Columbia.'" (Emphasis by respondent.) (Bishop Br. 11) However, contrary to respondents assertion, Senator Eagleton was not referring to a provision of the Self-Government Act or any home rule act, but rather an entirely distinct sort of measure, the District of Columbia Revenue Act of 1971, H.R. 11341, 92d Cong., 1st Sess. (1971). See 117 Cong. Rec. 42498 (1971).[1] The Court of

[1] The provision of the District of Columbia Revenue Act of 1971 discussed by Senator Eagleton, § 809(b), was omitted from the final enactment. *See* Pub. L. 92-196, 85 Stat. 651 (1971).

Appeals similarly referred to this remark erroneously as one made "[d]uring the Senate hearings on the Home Rule Act" (App. 3a), hearings which took place two years later. The difference between a provision in a revenue act and a home rule act is significant. The Revenue Act of 1971 discussed by Senator Eagleton did not purport to grant the District Government legislative authority over "all rightful subjects of legislation." D.C. Code, § 1-124 (Supp. V, 1978).

Moreover, the debate in the Senate over the District of Columbia Revenue Act of 1971 was clearly not concerned with the possibility of a franchise tax on nonresident businesses, but rather of the prospect of a tax on the personal income of individual nonresidents. The provision in question was described as "a specific exception prohibiting the Council from levying a personal income tax on nonresidents." 117 Cong. Rec. 42498. There was no mention whatever of franchise taxes or other business taxes. From the context it is clear that Senator Eagleton was speaking of "nonresidents" in the sense of natural persons, not business entities. As we noted in our certiorari petition (*id.* at 13 & n. 6), the "reciprocal income" and "commuter tax" proposals of the District Government in the 91st and 92d Congress were across-the-board taxes aimed at salaried employees, not at businesses. Thus, Senator Eagleton's comments, placed in proper context, provide absolutely no support for the conclusion that § 602(a)(5) of the Self-Government Act prohibited the imposition of franchise taxes on businesses.

Any doubt as to Senator Eagleton's views in this regard can be resolved by examining his statements on the floor of the Senate, five weeks earlier, with respect to the home rule bill he sponsored in that Congress, S. 2652, 92d Cong., 1st Sess. (1971). In discussing a provision of that

bill identical to § 602(a)(5) of the Self-Government Act, he made it clear that this limitation on the broad power of a home rule District Government was not intended to preclude the District from imposing a franchise tax on nonresidents:

> For example—of utmost importance—the present mayor-commissioner and city council have jurisdiction over taxes—to wit, the real property tax. They can raise it or lower it. As to all other taxes, *including franchise taxes,* sales taxes, local income taxes, that jurisdiction is in Congress. *We transfer the jurisdiction of taxation* to the elected city council and to the elected mayor—*holding back,* as I said before, the *commuter tax.* (Emphasis added.)

117 Cong. Rec. 35747 (1971). Viewed in the light of this contemporanous statement, Senator Eagleton's remark with regard to the District of Columbia Revenue Act of 1971, in a context devoid of any reference concerning franchise taxes, surely can not overcome the plain meaning of the Self-Government Act or justify the serious deprivation of governmental rights ensuing from the Court of Appeal's decision.

The final shred of legislative history relied upon by respondents is a remark by Representative Gude during a committee's markup of an early House version of the home rule bill, H.R. 9056, 93d Cong., 1st Sess. (1973). Respondent Bishop asserts that "Representative Gude, the House sponsor of the prohibition, confirmed that it would preclude 'any tax which is based on a percentage of income regardless of whether it is technically considered personal income.' " (Bishop Br. 11). This remark, like the others, is taken out of context, and fails to withstand

close scrutiny. The remark was part of the following exchange between Representatives Breckinridge and Gude:

> Mr. Breckinridge. I have a question.
>
> Mr. Diggs. I yield to the gentleman from Kentucky.
>
> Mr. Breckinridge. I am concerned about the phrase, "personal income tax." I take it what we are driving at here is precluding any tax which is based on a percentage of income regardless of whether it is technically considered personal income.
>
> Let me illustrate [.] [A]n occupational tax is not an income tax technically, under certain jurisdictions, I do not know about this jurisdiction.
>
> Mr. Gude. The thrust of this amendment, the interpretation would be that that would be included under this amendment.
>
> . . .

Staff of the House District of Columbia Committee, Home Rule for the District of Columbia 1973-1974, Background and Legislative History, 93d Cong., 2d Sess. 1126 (1974). Thus, Mr. Breckinridge's principal concern was whether the term "personal income tax" embraced "occupational taxes." This is hardly evidence, however, of a congressional intent to preclude the District from imposing a tax on the earnings of businesses. The focus of the discussion was clearly upon the prospect of the imposition of a tax on individuals. Mr. Breckinridge's concern is put in proper perspective by reference to the occupational tax imposed by the jurisdiction in which he practiced law, Lexington, Kentucky. That city imposes an "Occupational License (Income) Tax" on "both residents and nonresi-

dents of the City of Lexington at the rate of one and one-half per cent (1-½%) of all *salaries, wages, commissions and other compensation earned* for work done or services performed or rendered in the City." Lexington-Fayette Urban County Ordinance 2822, Kentucky CCH Tax Reporter ¶¶ 72-010, 72-020. (Emphasis added.) Thus, these remarks, taken as a whole and with reference to the taxing jurisdiction in which Mr. Breckinridge practiced, show that the focus of his concern was whether the provision would prohibit the imposition by the District of the same type of tax imposed on the *salaries and wages* of nonresidents by the City of Lexington. There is no indication that his remarks were directed at the type of franchise tax imposed on unincorporated businesses in the District; indeed, with respect to the taxing scheme of the District, he admitted, "I do not know about this jurisdiction." Thus, this exchange between Representatives Breckinridge and Gude during a committee meeting provides no evidence of a congressional intent to preclude the District from imposing a franchise tax on business entities.

In conclusion, nothing can minimize the seriousness of the deprivation of self-government to the people of the District ensuing from the decision of the Court of Appeals. Congress, in enacting the Self-Government Act, plainly granted the District statelike taxing power, withholding only the authority to impose taxes on the personal income of individual nonresidents. It did not preclude the District from imposing a franchise tax on business entities operating within the District. The statements of members of Congress upon which respondents and the Court of Appeals rely are taken out of context and, upon careful examination, do not support their position. In any case, such meager legislative history certainly cannot overcome the plain meaning of the Self-Government Act. The serious deprivation of self-government resulting from such a rewriting

of the Self-Government Act and the detrimental impact on the fiscal integrity of the District, which is undisputed, surely present a question of importance sufficient to warrant this Court's review.

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